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No.

In the Supreme Court of the United States

ROBERT J. SMOTHERS,

Petitioner,

v.

GARY R. MCCAUGHTRY, WARDEN

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At petitioner's state homicide trial, the prosecution introduced evidence in its case in chief of petitioner's invocation of the Fifth Amendment in the face of police questioning to show his "consciousness of guilt." Then, in closing argument, the prosecution impeached petitioner's claim of self-defense, arguing that it had been fabricated because petitioner waited "five plus months" after arrest to "make a statement" that he acted in self-defense. The prosecution further claimed that petitioner's testimony fit the evidence and legal standard for self-defense because he had the assistance of retained counsel to help fabricate his testimony. Petitioner's trial counsel did not object to any of this. Petitioner was convicted of second-degree homicide and sentenced to forty years in prison.

On federal habeas review, the district court granted relief on petitioner's ineffective-assistance-of-counsel claim. The Seventh Circuit reversed, holding that petitioner's counsel had not been deficient because the prosecution's actions were permissible. The question presented is whether petitioner received ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), which comprises three issues concerning the meaning of this Court's precedents:

1. Contrary to *Doyle* v. *Ohio*, 426 U.S. 610 (1976), *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986), and *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), may the prosecution support permissible impeachment by otherwise unconstitutional references to a defendant's post-*Miranda* silence and retention of counsel?

2. Contrary to *Wainwright* and *Griffin* v. *California*, 380 U.S. 609 (1965), may the prosecution introduce, in its case in chief, evidence of a defendant's government-induced invocation of the Fifth Amendment?

3. Contrary to *Strickland*, may a federal court refuse to consider a Sixth Amendment claim that is based on trial counsel's failure to make a state law objection to evidence that is independently inadmissible under the state constitution?

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PETITION FOR A WRIT OF CERTIORARI

Robert J. Smothers respectfully petitions for a writ of certiorari to review the Seventh Circuit's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is reported at 418 F.3d 711. The opinion and order of the district court granting habeas relief (App. 8a-52a) are unreported.

JURISDICTION

The Seventh Circuit entered judgment August 9, 2005 and denied rehearing and rehearing en banc October 19, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The Sixth Amendment to the United States Constitution provides in relevant part that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part that:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

A. Introduction

Jay Meyer strangled petitioner Robert J. Smothers to the brink of unconsciousness, then tried to crush his windpipe. In resisting the attack, Smothers tried to summon help, made

two attempts at retreat, and employed three forms of non-lethal force, but none of this helped. Finally, while pinned on his back with Meyer sitting on him and still strangling him, Smothers managed to hit Meyer in the chest with the pocket knife. This stopped the attack but was fatal. Smothers was arrested, given *Miranda* warnings, and tried five months later for homicide.

In its case in chief, the prosecution introduced Smothers' tape-recorded invocation of the Fifth Amendment in the face of police questioning to show his "consciousness of guilt." See *infra* at pp. 7, 28. Then, in closing argument, the prosecution impeached Smothers' claim of self-defense by arguing that it had been fabricated since Smothers waited "five plus months" after arrest to "make a statement" that he acted in self-defense. See *infra* at pp. 8-9, 17-21. The prosecution also claimed that Smothers' testimony fit the physical evidence and legal standard for self-defense because he had the assistance of retained counsel during those "five plus months" to help fabricate his testimony. *Ibid.* Smothers' trial counsel did not object to any of this. Smothers was convicted of second-degree homicide and sentenced to forty years in prison.

On federal habeas review, the district court (E.D. Wis., Stadtmueller, J.) granted relief. In a 56-page opinion, the court concluded that Smothers' counsel was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984), for failing to object to the prosecutor's impeachment under *Doyle* v. *Ohio*, 426 U.S. 610 (1976), which holds that any impeaching use of a defendant's post-*Miranda* silence violates due process.

The district court found that Smothers was prejudiced by counsel's deficient performance because "the prosecution's case hinged almost entirely on the credibility of Smothers' trial testimony" and there was "a fair probability that the jury would have been persuaded by the prosecutor's improper argument and believed [that] if Smothers had truly acted in self-defense, he would have notified the authorities of this fact prior to trial." App. 46a.

In an opinion by Judge Bauer, joined by Judges Easter-

brook and Manion, the Seventh Circuit reversed, holding that

(1) The prosecution's impeachment did not violate *Doyle* because it was directed at pre-*Miranda* conduct.

(2) The prosecution's case-in-chief use of Smothers' invocation of the Fifth Amendment was not unconstitutional because it was used for impeachment and not as substantive evidence of guilt.

App. 6a. And by failing to address the issue, the Seventh Circuit implicitly held that:

(3) Smothers could not base a *Strickland* claim on counsel's failure to make a state law objection to the use of Smothers' taped invocation of the Fifth Amendment (which was inadmissible for use in the prosecution's case in chief under the state constitution).

As explained herein, review is warranted because the decision below conflicts with this Court's precedents on these three issues and, in turn, creates multiple splits of authority among the lower courts as to what those precedents establish.

A. Facts

On March 23, 1996, petitioner Robert J. Smothers and his friend Jay Meyer spent the day riding around and drinking alcohol. D6, Tr. 9/11/96 at 31-36.[1] Around 6:00 p.m., they stopped at a local bar and drank some more. *Id.* at 36-37, 39. After two hours, Smothers badgered Meyer to leave so they could go eat dinner at Meyer's home, as previously planned. *Id.* at 27-28, 36-39. They left the bar and got into Meyer's truck, but the badgering had angered Meyer because he had not been ready to leave. *Id.* at 39. So rather than drive to Meyer's home for dinner, Meyer raced his truck out of the parking lot, spun his tires down the street, ran a red light and

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[1] The record is cited as D# where # is the district court docket number. Thus, "D7, Ex. M at 8" refers to page 8 of exhibit M to docket entry 7, whereas "D6, Tr. 9/11/96 at 2" refers to page 2 of the September 11, 1996 trial transcript attached to docket entry 6.

stop sign, and remained stone-cold silent as he drove Smothers home to drop him off without dinner. *Id.* at 39-40. After arriving at Smothers' apartment, they began arguing about the fact that Meyer was not bringing Smothers over to eat. *Id.* at 40-41. Smothers soon gave up and sarcastically told Meyer to "go home and beat your wife and kid," a reference to an earlier conversation where Meyer confided to Smothers that Meyer recently had been violent toward his family. *Id.* at 23-25, 41-42. Smothers' comment enraged Meyer, whose blood alcohol level was around 0.23 at the time. D6, Tr. 9/9/96 at 152. Meyer lunged toward Smothers, grabbed his throat, and began strangling him. *Id.* Tr. 9/11/96 at 42.

The fight was not an even match: Meyer was 41, 190 pounds, nearly six feet tall, and in good enough shape to have helped carry a pool table across the bar earlier. D6, Tr. 9/9/96 at 105, 137; *id.* Tr. 9/10/96 at 75-76. Smothers was 36, 5' 9", obese and out of shape at 230 pounds, and suffering from high blood pressure that required medication. D8 at 8; D6, Tr. 9/11/96 at 19, 53, 89, 91, 136-37.

As the two struggled, Meyer locked his arms and climbed on top of Smothers so Smothers' back was half-way [illegible] the seat and half-way against the door. D6, Tr. 9/11/96 at 42. All the while, Meyer kept his hands wrapped around Smothers' throat. *Id.* at 42-43.

In an effort to break Meyer's grip, Smothers employed several forms of non-lethal force. He tried hitting Meyer on the head with his fist. *Id.* at 70. He tried jabbing Meyer with his house keys. *Id.* at 43, 74-75. He also tried to summon help by honking the truck's horn with his foot. *Ibid.* Nothing worked, and Smothers' "eyes started getting dim, sort of like a television." *Id.* at 44-46, 70.

While being choked, Smothers managed to get out a pocket knife and cut Meyer's left hand and forearm. *Ibid.* When that did nothing, Smothers used the knife to cut Meyer's chin. *Id.* at 45-46, 74. Meyer briefly moved, and Smothers reached back, grabbed the door handle, and yanked it open. *Ibid.* They fell out of the truck, and Meyer lost his